Nos. 76-416, 474, 475, 499, 500, 501

In the Supreme Court of the United States

OCTOBER TERM, 1976

DELAWARE STATE BOARD OF EDUCATION, ET AL.,
APPELLANTS

v.

BRENDA EVANS, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

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Pursuant to Supreme Court Rule 16(c), Appellees move the Court to affirm the Judgment of the United States District Court for the District of Delaware entered on June 15, 1976, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The May 19, 1976, Opinion and June 15, 1976, Interim Remedy Judgment of the United States District Court for the District of Delaware are not yet reported. They are set out in Appendix A and Appendix B of the Jurisdictional Statement of Appellants State Board, et al. The prior inter-district violation Ruling and Judgment of the District Court are reported at 393 F. Supp. 428 (D. Del., 1975), aff'd 423 U.S. 963 (1975).*

QUESTION PRESENTED

Is any issue warranting further argument presented by the District Court's action in ordering that effective steps be taken to devise and to implement a remedy commensurate with the inter-district violation previously adjudicated?

STATEMENT

A. Introduction

The major grievance of all of the Appellants with the decision of the court below is its determination that an inter-district violation had occurred which necessitated consideration of an interdistrict school desegregation remedy.[1] As we demonstrate on p. 22 *infra,* the existence of an inter-district violation has already been settled because it was previously decided by the court below, 393 F. Supp. 428, and affirmed by this court, 423 U.S. 963.[2]

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* References to the Interim Remedy Ruling will be to the Appendix in State Appellants' Jurisdictional Statement in the form, for example, of A. 21. Citations to the other opinions and orders in this cause will be in the form, for example, of 393 F. Supp. at 430.

[1] See, e.g., Jurisdictional Statement of the State Board, pp. 9-15.

[2] See also Memorandum of the United States, p. 1, n.1.

Accordingly, the only isue properly presented to this court now is whether the court below abused its discretion in the character of the relief it ordered. This far narrower question forms only a small part of Appellants' contentions, and indeed some of the Appellants apparently wish *only* to relitigate the violation issue, making no claim that the District Court otherwise exceeded its remedial authority.[3]

Notwithstanding the narrow compass of the legal issues remaining in this long-running suit, we believe it useful to describe in some detail the nature of the violations found by the court below because Appellants have mischaracterized and distorted them and because a clear understanding of this history demonstrates that the District Court did not exceed its authority in determining the appropriate scope of relief.

B. Prior Proceedings

This is simply the latest phase of a law suit begun in 1957. "Its object was to eliminate *de jure* segregation in Delaware schools" 393 F.Supp. at 430, and "to effectuate a transition to a racially nondiscriminatory school system" as required by *Brown* II, 349 U.S. 294, 300-301 (1955). Without rehearsing all of the prior proceedings it is pertinent to note that the original *de jure* segregation in New Castle County has never been remedied. Although a plan for desegregation of Delaware public schools was accepted in 1961, the court approved the plan "only to the extent that it [would prove] effective," 379 F.Supp. 1218, 1223, and retained

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[3] See the joint Jurisdictional Statement filed by the Mount Pleasant, Alfred I. DuPont, Alexis I. Dupont on Conrad Area School Districts.

jurisdiction, 195 F. Supp. 321, 325. As the court subsequently found, the plan did not prove effective in New Castle County. 379 F. Supp. at 1223 and 1228-30; 393 F. Supp. at 433, 437-8; A. 1-2, 14 n. 43, 16 n. 50, 39.

It is also pertinent that the State and other inter-district violations that provide the basis for the relief now under consideration did not arise only in the later phases of this litigation, but were rooted in circumstances existing at the time of *Brown*. As the court below found, local school districts in Delaware were then "not meaningfully 'separate and autonomous'," 393 F. Supp. at 437. Rather they were subordinate to the State system of segregation and their boundaries were dual and overlapping, permeable, or disregarded for the purpose of imposing racially segregated schooling. Specifically at the time of *Brown* "*de jure* segregation in New Castle County was a cooperative venture involving both city [i.e., Wilmington] and suburbs." *Id.* Because of such circumstances, the District Court's 1961 decree ordered the State Board to submit a revised school code to the legislature, including a reorganization of the "crazy quilt pattern of [school] districts and laws governing education", as part of the plan for desegregation of the Delaware Public Schools. 195 F.Supp. at 325.

Although the State Board recommended a new school code and redistricting to the General Assembly, they were not enacted. When the legislature finally responded in 1968 with the Educational Advancement Act, it explicitly excluded the Wilmington school district from the discretion vested in the State Board to reorganize all districts throughout the State, expressly legislating

that the boundaries for this "reorganized school district" "shall be the City of Wilmington with the territory within its limits." 14 Del. C. 1004(c)(2) and (4), 1005. The State Board did not submit the Act and reorganization to the District Court for review.

In 1971, Plaintiffs by Amended Complaint petitioned the District Court for supplemental relief; challenged the constitutionality of the 1968 Act and redistricting; and requested that the continuing inter-district segregation in New Castle County be finally and effectively dismantled.[4] A 3-Judge Court was convened pursuant to 22 U.S.C. 2281. Following a lengthy evidentiary hearing, briefing, and argument, the District Court on July 12, 1974, found continuing *de jure* violations within Wilmington, but reserved ruling on the constitutionality of the 1968 Act and redistricting and other claims of inter-district segregation. 379 F. Supp. at 1223-4.[5]

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[4] The Wilmington school district intervened as a Party Plaintiff and joined in the Petition and Amended Complaint. The State Board Appellants' statement (Jurisdictional Statement, p. 5) that the basis for the inter-district "complaint" here was solely (or even primarily) the change in Wilmington's student population from 31.6% black in 1956 to 82.7% black in 1973 is unfounded. The Plaintiffs' initial Petition for Supplemental Relief, the District Court's inter-district violation ruling, and the District Court's Interim Remedy Judgment were expressly based on the fact that the continuing and increasing disparity in pupil enrollments between Wilmington and suburban New Castle County school districts was *substantially caused* by the purposefully racially discriminatory acts of the State and its subdivisions. See, e.g., 393 F. Supp. at 437-438, 445; A.11-14, 17-19, 39-41.

[5] In a separate opinion, Circuit Judge Gibbons reached the issues reserved by the majority. Judge Gibbons held the 1968 Act and redistricting unconstitutional and found that the historic inter-district *de jure* segregation in New Castle County had not been eliminated. 379 F. Supp. at 1228-1233.

Two weeks later, on July 25, 1974, this Court issued its opinions in *Milliken* v. *Bradley*, 418 U.S. 717. Thereupon, the District Court invited the reorganized school districts of New Castle County to intervene and to present evidence on all issues raised by Plaintiffs' 1971 Petition for Supplemental Relief and Amended Complaint. Virtually all suburban school districts intervened as parties defendant; they elected to adopt the State Board pleadings and to stand on the evidence already of record. Briefing on all inter-district segregation issues and the impact of *Milliken* followed. On March 27, 1975, the District Court, District Judge Layton dissenting, issued its Opinion. Applying the *Milliken* legal standards to the evidence adduced, the District Court found significant inter-district, *de jure* segregation throughout New Castle County. 393 F. Supp. at 431-2, 438, 445, 447. The District Court directed the parties to submit alternative inter- and intra-district desegregation plans. 393 F. Supp. at 447.

Pursuant to 28 U.S.C. 1253, the State Board appealed the inter-district Violation Judgment and Order to this Court. In its Jurisdictional Statement, the Appellant State Board argued that the findings of a substantial inter-district segregation violation were incorrect and that the order to come forward with inter-district desegregation plans was therefore unsupported. This Court summarily affirmed, Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting, on the grounds that the appeal did not lie under 28 U.S.C. 1253 within the Supreme Court's jurisdiction. 423 U.S. 963 (1975).

Thereafter, in August, 1975, the parties submitted desegregation plans to the District Court for consideration. Following three weeks of evidentiary hear-

ings, briefing, and argument, the District Court, Judge Layton dissenting in part, issued its interim remedy ruling on May 19, 1976, and its Interim Remedy Order on June 15, 1976. The District Court, Judge Layton concurring, held that all intra-district plans limited to Wilmington proper were wholly inadequate to remedy the inter-district segregation violation in New Castle County previously found. A. 17-19, A. 61-64. After carefully evaluating the various inter-district plans submitted, the District Court established an interim framework for developing an effective remedy should the proper State and local authorities fail to meet their continuing obligation to effectively remedy the inter-district segregation violation. A. 33-47.[6]

Pursuant to 28 U.S.C. 1253, the various defendants now appeal from this Interim Remedy Ruling and Order to this Court, and Plaintiffs file this Motion to Affirm.

C. The Nature and Extent of the Inter-District Segregation Violation Previously Found by the District Court

Based on the application of the *Milliken* legal standards to the record evidence, the District Court found a continuing inter-district segregation violation in New Castle County. 393 F. Supp. at 447. The *de jure* nature and broad extent of this inter-district violation were detailed in the District Court's previous findings and may be summarized as follows:

1. At the time of *Brown*, and for some time thereafter, "*de jure* segregation in New Castle County was

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[6] Judge Layton, dissenting from the particular interim remedy ordered, favored judicial development and implementation of a mandatory inter-district transfer program. A.61 *et seq.*

a cooperative venture involving both [Wilmington] city and suburbs. . . . [A]t that time, a desegregation decree could properly have considered city and suburbs together for the purpose of remedy. At that time, in other words, Wilmington and suburban districts were not meaningfully 'separate and autonomous.'" 393 F. Supp. at 437. This ultimate finding was based on subsidiary findings of fact that local school districts were then subordinate and their boundaries dual or overlapping or simply breached in order to implement the basically monolithic Delaware system of school segregation, with one state system of schooling for blacks and another for whites. Although the specifics of this unique state dual system of schooling varied somewhat from place to place and time to time, 393 F. Supp. at 433, it was in the District Court's words unmistakably "an historic arrangement for inter-district segregation within New Castle County."[7] 393 F. Supp. at 447.

2. Over the next two decades, during a period of great population growth and demographic change in

[7] Thus, for example, the State-mandated and State-financed black elementary, junior, and senior high schools located within Wilmington long served substantial numbers of black children residing throughout New Castle County, indeed throughout the State. 393 F. Supp. at 433. Likewise, *de jure* white schools located within Wilmington long served substantial numbers of white children residing throughout New Castle County. *Id.* See also, 379 F. Supp. at 123 (Circuit Judge Gibbons, separate opinion). In the face of these findings, Appellants' claims that the effective boundaries of the Wilmington School District have been tied to the city limits since 1905 and that school districts in New Castle County have long been separate and autonomous are not factual. (See, e.g., Jurisdictional Statement of New Castle—Gunning Bedford School District at pages 4 and 11).

New Castle County,[8] the District Court found "significant governmental involvement in inter-district discrimination." 393 F. Supp. at 447. This involvement not only made the dismantling of the historic inter-district segregation of New Castle County much more difficult, 393 F. Supp. at 432-3 (Cf., *Swann,* 402 U.S. at 14), but it was also found by the District Court to be an independent constitutional violation under *Milliken,* significantly contributing to the marked inter-district segregation flourishing in New Castle County schools. 393 F. Supp. at 438. These ultimate findings were based on several subsidiary findings of fact.

First, the "withdrawal" of suburban children some time after *Brown* from Wilmington schools "reduced, to an extent, the proportionate white enrollment" of the Wilmington schools. 393 F. Supp. at 434 n.8.[9] Second, pervasive racial discrimination in the suburbs, not present to the same degree in the city, in the sale or rental of private housing—sanctioned, supported, and backed by a long history of numerous and specific public actions (federal, state, and local)—excluded black families from new housing opportunities in the

[8] During the period from 1954 to 1973, the public school enrollment of suburban New Castle County expanded from 21, 543 children (of whom 4% were black) to 73,008 (of whom 6% were black). This large suburban population growth corresponded with the growth of more identifiably black schools in Wilmington, which changed during this period from 12,875 pupils (28% black) to 14,688 pupils (83% black).

[9] As an independent violation, the District Court "did not find this 'withdrawal' of students to be significant inter-district segregation under *Milliken.*" 393 F. Supp. at 434 n. 8. It was, however, a further step in the continuing separation of the races in New Castle County. 393 F. Supp. at 433, 437-8; 379 F. Supp. at 1228-1230 (Circuit Judge Gibbons, separate opinion); A.14 n. 43, 39.

suburbs and thereby excluded them from the burgeoning suburban schools and funneled them into Wilmington. 393 F. Supp. at 434-5. Third, state public housing authorities, acting pursuant to discriminatory policies and practices, concentrated increasing numbers of black families within Wilmington and its schools to the exclusion of suburban public housing and schools. 393 F.Supp. at 435.[10]

Fourth, the Wilmington Board, with the sanction of the State Board, maintained five pre-*Brown* "colored" schools as virtually all-black schools and implemented discriminatory policies (e.g., optional zones) to define additional schools as *de jure* black which "may have encouraged white families to move out and discouraged white families from moving in [to Wilmington]," 393 F. Supp. at 436. See also 379 F. Supp. at 1223.[11] Fifth, since 1968, the State subsidized the transfer of

[10] In dealing with this public housing discrimination, and with the private housing discrimination supported by governmental racial discrimination, the District Court examined their impact on inter-district population movements and their interrelationship with the continuing interdistrict school segregation. 393 F. Supp. at 434-8. The District Court found that such governmental discrimination had substantial inter-district effects and significantly contributed over a twenty-year period to the increasing concentration of blacks in Wilmington and the decline in the percentage of black residents living in the suburbs at a time when the total suburban population increased fivefold. 393 F. Supp. at 438.

[11] Thus were the Wilmington schools "earmarked" as the "black schools" to all who cared to see throughout New Castle County. Cf., *Keyes* v. *School District No. 1,* 413 U.S. 189, 202 (1973). As the District Court noted, "[R]ealtors testified that sales in the housing market are tied to the [racial] characteristics of the schools in the neighborhood: 'The first thing you teach yourself is know your school district because you sell houses in New Castle County based on school districts.' " 393 F. Supp. at 437. Cf. *Swann,* 402 U.S. at 20-21.

substantial numbers of white Wilmington children to private schools in the suburbs. This, too, "has undoubtedly served to augment the racial disparity between Wilmington and suburban public school populations." 393 F.Supp. at 437. Finally, the vestiges of the historic inter-district system of public school segregation—the pre-*Brown* black schools within Wilmington and pre-*Brown* white schools in the suburbs, as well as their broader, reciprocal and continuing effects on near-by schools—were never eliminated but rather persist. 379 F. Supp. at 1223; 379 F. Supp. at 1228-30 (Circuit Judge Gibbons' separate opinion); 393 F. Supp. at 433, 437-8, 442; A. 1-2, 14 n.43, 16 n.50, 39.[12]

In sum, during the twenty-year period after *Brown* of both marked demographic changes and growing independence in the operation of Wilmington and suburban schools, 393 F. Supp. at 432-3 and 437-8, the Court found that the historic, county-wide arrangement for inter-district segregation far from being

[12] Thus the claim by Appellants that the suburban school districts were found to be "unitary" (see e.g., State Board Appellants' Jurisdictional Statement at page 6) is false when viewed in the *inter*-district context appropriate under *Milliken.* What the District Court did find with respect to the suburban districts is that when each was viewed in isolation in their respective *intra*-district contexts, there was "no evidence in the record which indicates that [they] are presently operating other than unitary schools for the children *residing* in their districts" [*emphasis* added]. 393 F. Supp. at 437 n. 19. However, wholly independent of the unconstitutional 1968 Act and state-wide reorganization which made each suburban school district defendant here a "reorganized district", the District Court made clear that its finding of an inter-district segregation violation extended throughout New Castle County and included every school district. See, 393 F. Supp. at 433-438; A. 11, 13-14 and n. 43.

effectively dismantled was continued and even significantly exacerbated by this variety of racially discriminatory governmental conduct. Applying the *Milliken* standards, the District Court concluded that these inter-district segregation practices "are responsible to a significant degree" for the marked racial disparity between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 438.

3. It was against this background of continuing inter-district segregation that the District Court found that the Educational Advancement Act and state-wide reorganization of school districts in 1968 "contributed to the separation of the races by . . . drawing or redrawing of school district lines" (Cf., *Milliken,* 418 U.S. at 755, Stewart, J., concurring), thereby further isolating Wilmington's basically black schools from its suburban and virtually all-white counterparts by discriminatory state action. 393 F.Supp. at 445-6. The District Court based this declaration of unconstitutionality on a careful analysis of the specific provisions and operation of the Act, as well as their historical context, immediate objective, ultimate effect, purported justifications, and the alternatives proposed and studied. 393 F.Supp. at 438-446. The District Court found:

> School district reorganization pursuant to the Educational Advancement Act amounted to an educational redistricting. Invidious discrimination in such redistricting is perforce an "inter-district violation." The Educational Advancement Act "redrew" the Wilmington school district lines by removing the existing Wilmington boundaries from the State Board's discretion at the same time that other school districts in Delaware were eligible for consolidation . . . . Here,

> the racially discriminatory exclusion of Wilmington prevented the State Board from considering whether sound educational principles dictated a consolidation of Wilmington with other school districts. But for this racial classification, the [State] Board may have consolidated Wilmington [or various parts thereof] with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly . . . [T]he reorganization provisions played a significant part in maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts.

393 F. Supp. at 445-6 and n.36.[13] This inter-district school district boundary violation thereby affected all

[13] Given the prior history and continuing inter-district segregation and the outstanding 1961 District Court order to reorganize school districts state-wide to eliminate all vestiges of the historic state system of inter-district segregation, the District Court's evaluation of the 1968 Act and reorganization may be viewed as pursuant to *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972) and *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484 (1972). E.g., 379 F. Supp. at 1225 et seq. (separate opinion of Circuit Judge Gibbons); 393 F. Supp. at 445; A.18. Under this remedial test, although the District Court found no dominant racial motive in the General Assembly (393 F. Supp. at 445, A.55), the court quite properly held that the 1968 Act and reorganization not only perpetuated but cemented the prior and continuing *de jure* violation of inter-district segregation between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 445. However, the District Court *also* found the 1968 Act and reorganization an "independent constitutional violation." 393 F. Supp. at 438-446. In this context, it is clear that the District Court's determination that the provisions excluding the Wilmington District "were [not] purposefully racially discriminatory" refers to the dominant, subjective motivation of the General Assembly and individual legislators. 393 F. Supp. at 439; A.55. The District Court examined a number of legitimate or rational reasons for the state-wide reorganization of school districts wholly apart from racial concerns and desegre-

of New Castle County and further implicated every New Castle County school district in the continuing inter-district segregation.

Based on these three cumulative violations, the District Court found a substantial inter-district segregation violation significantly contributing to the marked racial disparity between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 438, 445. See also, A. 11-14.

D. The Scope of the Interim Remedy Ordered by the District Court

1. In its interim remedy ruling, the District Court analyzed the legal standards in *Milliken* and *Swann* which establish the proper scope for the exercise of equitable discretion to order a remedy for the inter-district segregation violation found in New Castle County.[14] A. 9-15. In particular the District Court, in

gation considerations. 393 F. Supp. at 439. But the District Court found that the legislature fully appreciated the inter-district segregative effect of its action. 393 F. Supp. at 439; also A.55. And, after analyzing the 1968 Act and reorganization in its total context under all the circumstances, the District Court found that it amounted to "unjustified" or "invidious" "racial discrimination." 393 F. Supp. at 445-6 and n. 36. Cf. *Reitman* v. *Mulkey,* 387 U.S. 369, 373 (1967). (In later evaluating the 1968 Act and reorganization under the "purpose" language of 20 USC 1715 and 1756, the District Court held that it had found the requisite racially discriminatory "purpose" in the 1968 Act and reorganization contemplated by Congress. A.55).

[14] The District Court focused primarily on the northern New Castle County area. This area comprises 251 square miles with twelve school districts (reorganized in 1968 from nineteen) and 80,678 public school students, 19.4% of whom are black. Wilmington Public Schools are 84.7% black, while ten of the eleven suburban school districts are more than 90% white. A. 4-5 and n. 9.

adhering scrupulously to the teachings of *Milliken* and *Swann,* held that the nature and extent of the inter-district violation determine the proper scope of any inter-district remedy (A. 10-11); that an inter-district violation must be substantial, not de minimis, and proximately related to the disparity in racial enrollments between districts to require an inter-district remedy (A. 10-11); and that the relief ordered must place the victims of the violation in substantially the position they would have occupied in the absence of the violation by insuring that a racially non-discriminatory system of public schools replaces the basically dual system (A. 14).[15] Under these standards the District Court again weighed the nature and extent of the cumulative inter-district violations and their effect on the racial disparity in enrollments between Wilmington and the other school districts of northern New Castle County. Amplifying its prior inter-district violation judgment, the District Court again found that the inter-district violations "had a substantial, not a de minimis effect on the enrollment patterns of the separate districts." A. 11. Recognizing that a variety of other factors may "also [have] contributed to a degree" to this inter-district school segregation, the District Court found that the racially discriminatory acts of the State and its subdivisions were "a substantial and proximate cause of the existing disparity in racial enrollments in northern New Castle County."[16] A. 12.

[15] Given the process followed and standards applied by the District Court, it is difficult to determine what more the Solicitor General (Memorandum pp. 8-9) would have any higher court tell the District Court to do. See Discussion *infra,* pages 28-32.

[16] The Solicitor General apparently agrees with these findings since he states, "[i]n our view, these . . . significant and continuing inter-district acts of racial discrimination . . . would require

2. The District Court therefore rejected all plans limiting the remedy to the confines of Wilmington proper because such intra-district plans merely perpetuated rather than remedied the inter-district segregation violation. A. 18-19.

3. The District Court then considered the variety of inter-district plans which had been submitted by the parties. With respect to the various voluntary transfer plans and other "magnet" approaches, the District Court found their use "as the sole means of system-wide desegration . . . decidedly unpromising." A. 23.

The various "cluster and center plans" proposed mandatory pupil reassignments between the existing Wilmington and suburban New Castle school districts to eliminate the inter-district segregation. Such inter-district assignment plans would effectively remedy the inter-district segregation and were manageable within existing state law provisions. A. 25. However, the District Court found that such plans in assigning pupils across district lines would be difficult to administer and fraught with potential educational and administrative

a significant inter-district remedy." Memorandum p. 9. [In response to the suburban districts' misreading of the District Court's prior inter-district violation opinion and of *Milliken* on the issue of suburban "innocence or guilt" the District Court noted several points. First, the suburban districts, all reorganized in 1968 pursuant to the Education Advancement Act, are the *product* of one of the inter-district violations and therefore part of the violation itself. A.12-14, 18. Second, under *Milliken,* 418 U.S. at 745, constitutional violations by others which cause inter-district segregation between districts, as here, permit inter-district relief against affected (albeit "innocent") school districts. A.12-13. Third, each of the reorganized suburban districts, and their predecessors, were actively involved in the inter-district violations wholly independent of other racially discriminatory State actions and their inter-district effects. A.13-14 and n. 42.

disputes between the districts which might call for continuing judicial supervision. A. 25-26. The District Court held:

> Where methods are available which will accomplish [an effective remedy] without the associated problems, the Court, as a matter of equitable discretion, should follow that course which will require its intervention in the least possible degree which will insure compliance. See generally, *Milliken,* 418 U.S. 740-45; *Gautreaux,* 44 U.S.L.W. 4483-85.

A. 26. In the exercise of its discretion, the District Court therefore declined to order inter-district "cluster and center plans." [17] A. 27.

With respect to the various proposals to "redistrict" (or subdivide) [18] or to consolidate New Castle County schools, the District Court held "that the power of the Court to order a reorganization would not appear to be in doubt," given the nature and extent of the inter-district violation, particularly where one of the violations found was the unconstitutional reorganization in 1968 which resulted in the very school districts before the Court as parties. A. 30-31. Although the redistricting proposals could be implemented pursuant to existing state law provisions, the District Court found that the State Board had failed to present "specific criteria" by

[17] As the Court found, "redrawing of attendance lines and other shifts in present patterns of attendance will undoubtedly be required to desegregate. But such plans are better drawn where control is in the hands of local leaders acting in accordance with constitutional limitations." A.27.

[18] For example, the State Board proposed a redistricting plan creating five new districts, each with one or more of the existing districts and one-fifth of Wilmington. A.28.

which to demonstrate where "present districts should be cut" and "during testimony . . . admitted that, in light of more recent figures, it would probably recommend somewhat different lines be drawn." A. 32. In view of the State Board's failure to present "specific criteria" for redistricting, the District Court determined that *any* redistricting "ought to be dealt with explicitly by State education officials" (A. 32):

> Absent such criteria, we feel that the more proper course is to create a situation which will not freeze the district lines by court order, but will create a framework within which the State can make a future determination of proper districts for the area, while insuring that actual desegregation will take place [in the interim].

A. 32. See also A. 36-37.

4. The District Court, therefore, set up a procedure whereby state officials would be given an opportunity in the first instance to develop an effective reorganization plan. The court made no "final determination of the organization of the area and of the lines to be followed in setting up such an area . . ." A. 33. Citing *Milliken,* 418 U.S. at 741-742 and *Hills* v. *Gautreaux,* 425 U.S. 284 (1976), 44 U.S.L.W. 4483-84, the court noted that "[s]uch decisions are far better left to legislators and the process of compromise than to the rigors of judicial determination. 418 U.S. at 744." A. 34. The Court went on to say "[d]eterminations of methods of governance, and the day-to-day operations of the schools will be left in the hands of appropriate local officials. This Court should have no need to interfere in those decisions, unless they violate federal law or constitutional provisions." A. 34.

However, to avoid a stalemate and to insure the elimination of the inter-district segregation found, the District Court provided for an interim consolidation and interim board drawn from the local districts to begin planning and to insure implementation should the State fail to take prompt and effective action.[19] A. 33, 44. To allow time for State officials to act with regard to the organizational structure and the Interim Board to plan for necessary pupil assignments, the court stayed portions of its judgment until September, 1977. A. 56-57. If the State has not acted by that time, the standby procedure already underway establishing an interim consolidated Board will become fully effective. A. 33-34, 36-37, 44, 46, 74-75. The court reiterated that this "reorganization . . . is effective only in the absence of proper State action to change it." A. 34.[20]

5. Exercising its equitable discretion, the District Court limited the school districts in northern New Castle County to be included in further pupil desegregation planning by the Interim Board only to those

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[19] This local process is well under way and may lead to a recommendation to the State authorities and to the Court, joined by all districts, that the districts retain their present structure while reassigning pupils and staff for some interim period.

[20] Pursuant to the District Court's invitation, the Delaware legislature has already expanded the Interim Board (responsible for planning and then administering the consolidated school district, subject to the supervision of the State Board) from five to thirteen members. 60 Del. Law C. 492. And the Interim Board, with its "Council of Superintendents" from each of the included school districts, is evaluating the propriety of various redistricting plans for possible recommendation to the State Board and the General Assembly for their consideration.

necessary for continuing and effective relief from the inter-district segregation violation. A. 37-41.[21]

6. For the benefit of the Interim Board and State Board (or any other pupil assignment authority created by the State should it accept the District Court's invitation to act), the District Court established the "starting point" for determining when a school would be viewed "prima facie" as 'substantially disproportionate" and thereby require the assigning authority to justify maintenance of such "one-race" schools under *Swann,* 402 U.S. at 26:

> A "one race" school for these purposes will be defined as a school whose racial enrollment figures indicate that its population is substantially disparate from the expected range of enrollments in a genuinely non-discriminatory system, allowing for a variation in pupil assignments.

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[21] Applying these criteria, the District Court excluded the school district (Appoquinimink) most distant from Wilmington because, *inter alia,* its inclusion would not have any impact on the overall effectiveness of any inter-district plan and its schools already were substantially integrated relative to the areawide racial composition. A. 38. However, the District Court included Newark, the school district on which there was substantial dispute among the parties, because, *inter alia,* it was necessary to insure that relief from the inter-district segregation would be effective and stable over time; and it was well within reasonable time and distance limitations. A. 39-41. The District Court specifically noted, however, that all pupils and schools in Newark (and other school districts included in further pupil desegregation planning) were not thereby required to be included in the actual plan of pupil reassignment to be developed by the Interim Board: "The issue in assignment of students will be whether the assigning agency in the future meets its burden of showing that the existence of one-race schools is not due to the maintenance of the dual system [of inter-district segregation]. *Swann,* 402 U.S. at 26." A. 41.

A. 42-43. Compare *Swann,* 402 U.S. at 24-26. Taking into consideration all of the factors involved in the case, and using the area-wide racial composition of 19.4% black only as a "starting point" (A. 42), the District Court advised the pupil assigning authority that schools ranging between 10 and 35% black in their enrollments would be considered "*prima facie* desegregated." A. 43. The District Court emphasized, however, that this was only an initial guideline for the local pupil assigning authority (A. 42); and that the object of pupil reassignments by the local authority is to dismantle the segregation caused by the inter-district violations (A. 41, 43). The District Court further advised that deviations would be permissible if justified under *Swann* criteria, but such review obviously would have to await development of the actual pupil assignment plan by the local authority.[22] A. 42-44 n. 150.

7. Finally, the District Court evaluated its proposed consolidation plan under the provisions of the Equal Educational Opportunity Act of 1974, 20 U.S.C. 1701, et seq. The District Court "complied fully with the statutory requirements here." A. 53. Of particular relevance, the District Court held that its prior finding on inter-district violations, including the 1968 Act and reorganization, were findings of the racially discriminatory "purpose" and inter-district effect contemplated under 20 U.S.C. 1715 and 1756. A. 55.

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[22] The Court specifically stated that distant schools, even in this small and compact area, need not be included in the pupil reassignments if the reassigning authority could show that such one-race assignments "were genuinely non-discriminatory." A. 43 n. 148. See also note 21, *supra.* The District Court added that the local school authorities had the discretion to do more, but they were not constitutionally required to do so. A. 43-44.

REASONS WHY THE INTERIM REMEDY JUDGMENT SHOULD BE AFFIRMED

I. Both This Court's Prior Affirmance of the Inter-District Violation Judgment and the Manifest Correctness of the Judgment Foreclose Further Review of Liability Issues.

Appellants' present challenge to the District Court's prior inter-district violation judgment must fail both because it comes too late and because it is insubstantial.

The challenge comes too late because this Court summarily affirmed the inter-district violation judgment on the prior appeal. 423 U.S. 963 (1975). Whatever the precendental meaning of such a summary affirmance for future cases (see, *Edelman* v. *Jordan*, 415 U.S. 651, 670-671 (1974)), it is a decision on the merits dispositive of the inter-district liability issue in *this*, the *same* case.[23] *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).

Even if this were not so, the challenge is insubstantial. From the historic arrangement for complete inter- district segregation which survived *Brown* through the 1968 Act and reorganization, which capped a twenty-

[23] Appellants, apparently conceding the dispositive effect on this appeal of a prior decision on the merits by summary affirmance, argue that in reviewing the prior interlocutory relief, "this Court could only consider whether issuance of the injunction constituted an abuse of discretion," citing *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). See, e.g., Jurisdictional Statement of Appellants State Board, et al., note at page 6. Under *Milliken*, however, it would have been a *clear* abuse of discretion for the District Court to order planning for inter-district desegregation in New Castle County, if there were *not* a substantial inter-district violation. See, *Milliken* v. *Bradley*, 418 U.S. at 743-747. Thus, under Appellants' reasoning, there can be no question that this Court's prior affirmance in this case represents a decision on the merits, dispositive of the liability issue. See also Memorandum of the United States, p. 1, n. 1.

year history of public racial discrimination contributing substantially to the racial disparity in enrollments between school districts in New Castle County, the evidence showed and the District Court found inter-district violations under *Milliken*. In the Statement *supra*, pp. 8-14, we have summarized the District Court's scrupulous application of the *Milliken* standards to the evidence and the detailed nature of its findings concerning these inter-district violations. The District Court assessed the impact of these inter-district violations on the racial disparity in pupil enrollments between school districts in New Castle County. After weighing all the potential contributing circumstances, the District Court found these constitutional violations "a substantial cause of [the] inter-district segregation," *Milliken* v. *Bradley*, 418 U.S. at 745, between Wilmington and suburban New Castle County school districts. 393 F. Supp. at 438, 445; A. 11-12. Suffice it to say that these findings, far from being plainly wrong, are supported by substantial evidence. See Statement, *supra*, pp. 8-16.[24]

[24] In the Detroit case, there were *no* lower court findings showing any inter-district violations significantly affecting the racial composition of the school districts in the Detroit area; to the contrary, the lower court findings focused *only* on violations and effects *within* the Detroit School District. *Milliken* v. *Bradley*, 418 U.S. at 744-751. Similarly, in the Richmond case, racially discriminatory acts were not found to have contributed to the disparity in pupil enrollments between the historically separate and autonomous Richmond, Henrico, and Chesterfield school districts. 462 F.2d at 1065-1066. In contrast, as detailed in the Statement, *supra*, pp. 8-14, the inter-district violation here includes: (1) an historic arrangement for complete inter-district segregation in New Castle County through *Brown* among school districts which were not then meaningfully separate and autonomous; (2) a subsequent twenty-year history of public racial discrimination, including by school authorities, which not only continued but exacerbated "to a significant degree"

Indeed, the Appellant's primary claim seems to be that the District Court erred in including the 1968 Act and reorganization as a part of the cumulative inter-district violation because there was no finding of racially discriminatory purpose. See, e.g., Jurisdictional Statement of Appellants State Board, et al., at pp. 9-13. Wholly apart from the fact that the constitutionality of the 1968 Act and reorganization has already been decided adversely to Appellants on the prior appeal, their claim has no merit.

First, the District Court held that, because of the existence of other purposeful acts of discrimination

the increasing pupil segregation *between* school districts in New Castle County; and (3) an unconstitutional 1968 state-wide school district reorganization which "played a significant part" in "maintaining the racial identifiability of Wilmington and the suburban New Castle County." In passing, we also reiterate that the District Court's violation findings concerning segregative housing practices here were based on governmental rather than private action; were evaluated in the context of the inter-related and inter-locking "school" violations; and assessed the overall impact of this state racial discrimination on the racial disparity in pupil enrollments between Wilmington and the suburban New Castle County districts. See, Statement, *supra,* pp. 10-11 and Notes 10-11. In contrast both the Court of Appeals and this court in *Milliken* explicitly refrained from any consideration of housing evidence, see 418 U.S. at 728 n. 7, 484 F.2d at 242; and the Court of Appeals in Richmond could not conclude from the district court's findings whether any such discrimination had any impact at all on the disparity in pupil enrollments between the Richmond and Henrico and Chesterfield school districts. See, 462 F.2d at 1066.

Thus Appellants' continuing attempt to argue that this case is the same or even similar to the Detroit and Richmond cases disregards the record and findings made below. *Milliken,* far from conflicting with the decision below, fully supports the judgment. The Solicitor General agrees with the District Court's view of the significant nature and substantial extent of the inter-district violation. See Memorandum p. 9; Statement, *supra* n. 16.

that contributed significantly to inter-district segregation, its inter-district violation judgment would stand "independently of the State's actions" with respect to the 1968 Act and reorganization. See, 393 F. Supp. at 438; A. 13-14; and Statement, *supra,* at pp. 8-12. Second, given the prior and continuing invidious inter-district segregation prevailing in New Castle County and the outstanding 1961 order of the District Court to reorganize school districts in Delaware to eliminate the vestiges of the state system for imposing school segregation, the remedial standard of *Emporia* and *Scotland Neck* was applicable: did the 1968 Act and reorganization maintain (or did it instead effectively dismantle) the prior and continuing inter-district segregation in New Castle County? See, 407 U.S. at 451, 460; 407 U.S. at 489-490.[25] There is *no* question that the 1968 Act and reorganization failed to pass muster under this test. 393 F. Supp. at 445; see also, A. 18 and Statement, *supra* Note 13.

Finally, as set forth in the Statement, *supra,* pp. 12-14, the District Court correctly found the 1968 Act and reorganization an independent constitutional violation after a careful analysis of "the totality of the relevant facts," *Washington* v. *Davis,* 44 LW 4792. Considering these facts, the District Court found that Plaintiffs had "made out" a "*prima facie*" case of *unconstitutional* racial discrimination, not just disproportionate racial "impact." *Id.* The District Court therefore shifted "the burden of proof" to the Appellants to justify the 1968 Act and reorganization. *Id.* Finding that on balance the justifications asserted

[25] In other words, in these circumstances, "[t]here was thus no need to find 'an independent constitutional violation.'" *Washington* v. *Davis,* — U.S. —, 45 L.W. 4793.

by the Appellants were insufficient to rebut the *prima facie* case, the District Court concluded that portions of the 1968 Act and reorganization amounted to "invidious discrimination." 393 F. Supp. at 446 n. 36. Thus, it is manifest that the District Court's analysis and judgment of the 1968 Act and reorganization were *not* based or "trigger[ed]" "solely . . . on racially disproportionate impact," *Washington* v. *Davis,* 44 LW 4792-4. To the contrary, they adhered to the substance of this Court's subsequent opinion in *Washington.*[26] See also, 44 LW 4800 (Stevens, J., concurring).

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[26] Of course, the District Court did not use the phrase "racially discriminatory purpose," speaking of "*invidious* discrimination" instead. 393 F. Supp. at 446. This semantic difference is, obviously, of no moment. Appellants, however, attempt to make much of the District Court's statement that it could not conclude "that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory." 393 F. Supp. at 439. However, for precisely the same reason, this anomaly is of no moment. For in making that statement, the District Court was referring to the "subjective intent of the decision maker," *Washington* v. *Davis,* 44 LW 4800 (Stevens, J., concurring), *not* a "purpose" or "intent" of the 1968 Act and reorganization in the *Washington* or *Keyes* sense. See, Statement, *supra,* Note 13. The District Court made clear that its judgment on the 1968 Act and reorganization included a finding of racially discriminatory or segregative "purpose" or "intent" in this sense when applying the provisions of 20 USC 1715 and 1756 to the case. A. 55; Statement, supra, Note 13. In other words, as with many state actions, the purposes of the 1968 Act and reorganization were diverse; here, however, one of the purposes was racial discrimination, "maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts." 393 F. Supp. at 495. Compare, e.g., *Keyes* v. *School District No. 1,* 413 U.S. 189, 210-214 (1973), where this Court noted that a state action "to . . . maintain" segregated schooling is *de jure* if "segregative intent" is "among the factors" that motivated the act in question.

Indeed, the District Court here "quite properly undertook to examine the constitutionality of the [Act] in terms of its 'immediate objective,' its 'ultimate effect,' and its 'historical context and the conditions existing prior to its enactment.'" *Reitman* v. *Mulkey,* 387 U.S. 369, 373 (1967). Far from foreclosing or departing from this approach which the Court has "frequently undertaken" itself, 387 U.S. at 373, *Washington* v. *Davis,* affirms the propriety of this long-standing Equal Protection analysis to insure that statutes, neutral on their face, do not in fact invidiously discriminate on the basis of race. 44 LW 4792-4794; and 4800 (Stephens, J., concurring).

In summary, it was "specifically shown" below, and the District Court specifically found, that the "racially discriminatory acts of the state or local school districts . . . have been a substantial cause of inter-district segregation" in New Castle County. *Milliken* v. *Bradley,* 418 U.S. at 745. Indeed, each of the examples of such inter-district violations given by the Justices in *Milliken* was found by the District Court here.

1. District lines have been drawn to frustrate the "process of dismantling a dual school system," 418 U.S. at 744, "deliberately . . . on the basis of race," 418 U.S. at 745, and so as to contribute to the separation of the races by drawing or redrawing school district lines," 418 U.S. at 755 (Stewart, J., concurring). See, Statement, *supra,* pp. 12-14.

2. There have been other "racially discriminatory acts" by "the state," by "local school districts," *and* by a "single school district" which have substantially contributed to the present inter-district segregation in New Castle County, 418 U.S. at 745, including, among many other acts, by "transfer of school units between districts," 418 U.S. at 755

(Stewart, J., concurring). See, Statement, *supra,* pp. 8-12.

3. State officials have "contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing . . . laws" between Wilmington and suburban New Castle County school districts, 418 U.S. at 755 (Stewart, J., concurring). See, Statement, *supra,* p. 10.

The District Court's finding that inter-district violations significantly contributed to the racial disparity between Wilmington and suburban New Castle County school districts is in accord with this Court's prior decisions and is manifestly correct.

II. The District Court Did Not Err in Providing for Interim Relief Pursuant To Its Duty To Prescribe Appropriate Remedies for the Inter-District Violation.

Given the propriety of the inter-district violation finding, the only issues ripe and worthy for decision on this appeal are whether the District Court abused its equitable discretion in providing for an inter-district remedy by (a) including a geographic area less than the full extent of the violation; (b) providing for an interim organizational structure, which requires the least possible judicial supervision over continuing local school authority action, to develop and implement an effective remedy; and (c) providing a broad and flexible racial guideline to be used by the local school authority as a starting point in developing the actual plan of non-discriminatory pupil assignments. These issues concern the District Court's exercise of its equitable discretion in supervising the development of an effective inter-district remedy for the inter-district violation found in the peculiarly local circumstances of this case. They present questions so insubstantial

as to require summary affirmance without further argument.

A. There is no abuse of discretion in the District Court's delineation of the geographic scope of the remedy. The court properly determined that all of the districts in New Castle County were implicated in the several inter-district violations committed by the legislature and by state and local officials; and that these violations were a proximate and substantial cause of the inter-district segregation. It then used the familiar criteria of feasibility, time and distance and stability to decide which of the districts implicated in the violation should be involved in the remedy. See *Swann, supra;* Statement, *supra,* Note 21. There is *no* abuse of judicial authority in the District Court's limitation of the geographic scope of the remedy only to major portions of northern New Castle County, when the inter-district violation included all of New Castle County. See, *Milliken* v. *Bradley,* 418 U.S. at 744; *Hills* v. *Gautreaux,* 44 LW 4483-4484.[27]

B. Appellants parrot the phrase "super-district" (e.g., Jurisdictional Statement of Appellants State Board, et al., at page 20), in challenging the District Court's order creating a single consolidated school authority to plan and to implement the inter-district remedy if the state should fail to take appropriate

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[27] It is not at all clear how the Solicitor General differs with the District Court's careful application of these judicial principles. The Solicitor fails to state any concrete factor that the court omitted from its consideration that would have enabled it to gauge the impact of the violation with more precision. Lacking this, the government's memorandum appears to be calling upon the District Court to engage in a ritualistic exercise that would allow it to avow with certitude, albeit fictionally, the mathematical impact of the violation.

action. Given the inter-district nature of the violation, however, the District Court had the "duty to prescribe appropriate remedies," *Milliken* v. *Bradley,* 418 U.S. at 744, i.e., to breach or otherwise restructure the existing school district boundaries in order to implement the necessary inter-district pupil desegregation. See also, *Hills* v. *Gautreaux*, 44 LW 4483-4484. Three workable approaches to the problem of organizational structure were presented in the various plans: inter-district transfers utilizing existing districts, redistricting or redrawing boundary lines, and consolidation, See Statement, *supra,* pp. 16-19. In these circumstances, no substantial claim of abuse of discretion should arise from the District Court's decision to use any one of the three alternatives available.

Moreover, the District Court's decision to rely in the first instance on consolidation, instead of inter-district transfers or redistricting, came only after a careful evaluation of the burdens and inconveniences of each alternative. See Statement, *supra,* pp. 16-18. Guided by this Court's admonitions in *Milliken* to avoid judicial entanglement in overall policy-making and day-to-day administrative responsibilities insofar as possible, 418 U.S. at 744, the District Court found that under any redistricting or inter-district transfers utilizing existing school districts, it would be required either to make difficult overall policy judgments (A. 32, 36-37) or to resolve day-to-day administrative disputes between school districts. A. 25-27. In contrast, after an initial consolidation (pursuant to existing state law provisions insofar as possible and subject to such reorganization and restructuring as the State may enact), the District Court need not intervene further in the operation of the schools by the local school authority,

i.e., the Interim Board (or other authority named by the State). A. 34.

Thus, the District Court chose the organizational structure—consolidation—requiring the least continuing judicial intervention. The District Court also specifically invited the State to substitute such alternative organization or structure as it may now or at any time hereafter deem fit. A. 33-34, 36-37, 44, 46. And the District Court delayed and staggered implementation over a two-year period both to give the State time to act and to permit cooperation and effective planning by all concerned, including the present local superintendents and school districts and the primary defendant, the State Board. See, Statement, *supra*, pp. 18-19.[28] In providing such a framework to implement an inter-district remedy, the District Court acted well within its "duty to prescribe appropriate remedies." *Milliken* v. *Bradley,* 418 U.S. at 744.

C. Having thus given the responsibility for planning and implementing inter-district remedy to the local Interim Board acting under the supervision of the State Board, the District Court provided a broad and flexible guideline for further planning for the pupil assignments necessary to remedy the unconstitutional, inter-district pupil segregation. Looking to the pupil racial composition of the affected area as a whole (19.4% black), the District Court established a broad "starting point" (10 to 35% black) within which the schools should be considered "*prima facie* desegre-

[28] The District Court's time frame for implementation represents the least of Plaintiffs' constitutional entitlement. See, *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 226, 290 (1969).

gated" (A. 43), i.e., not "substantially disproportionate." *Swann,* 402 U.S. at 26.

This broad range "starting point" was deliberately made flexible: the District Court, scrupulously adhering to *Swann,* 402 U.S. at 24-26, further advised that schools or sets of schools would be permitted to vary from this broad range upon a showing that such "substantially disproportionate" schools are not necessary to remedy the violation found, are beyond reasonable time and distance limitations, or are otherwise genuinely non-discriminatory. A. 41 and n. 135, 42, 43 and n. 148. See also, Statement, *supra,* Notes 21-22. Hence, the precise nature (and any judicial review of) the actual pupil assignment plan to be implemented "must await the actual assignments by the proper authorities" (i.e., by the Interim Board or such other local school authority as the State shall in the meantime designate). A. 44 n. 150. In these circumstances, Appellants' claim and the Solicitor General's suggestion that the District Court's ruling and judgment on further pupil desegregation planning may mandate forbidden "racial balance" is without substance.[29]

[29] The Solicitor General's discussion (Memorandum, pp. 8-11) of what standards and factors guided the District Court's interim remedy determination does not describe what the District Court said and did. First, unless the Solicitor General is requesting some fictional calibration of the impact of the inter-district violation (see Note 27 *supra*), no trial court could more scrupulously and expressly tailor the remedy to the nature and extent of the inter-district violation. Second, the District Court's basis for including and excluding certain districts from further planning for inter-district desegregation obviously does not relate to requiring a remedy *beyond* the violation; for the District Court utilized relevant, practicality requirements to *limit* the remedy to *less than* the full geographic scope of the violation. Finally, with respect to further planning for pupil reassignments between the districts included, the District Court expressly refrained from requiring any particular degree of racial balance in any school or classroom. Rather, the District Court advised the Interim Board to use the over-all racial composition of the area affected by the violation as a starting point and further advised that pupil reassignments were *constitutionally* required only to the extent necessary to remedy the violation pursuant to remedial criteria established by the decisions of this Court. In sum, even the Solicitor General's speculative quibbling over the fine details of what he admits will in any event be "a significant inter-district remedy" is premised on an erroneous reading of what the District Court has done.

III. This Court Has the Jurisdiction to and Should Decide This Appeal Without Further Argument.

All of the foregoing strongly suggests that the appropriate disposition of this appeal is a summary affirmance of the District Court's interim remedy judgment. The Solicitor General, however, proffers two alternative courses of action, neither of which is warranted under the circumstances here.

First, the Solicitor General suggests that the appeal from the District Court's interim remedy judgment lies in the Third Circuit rather than this Court "because the judgment *could have* been entered by a single judge." Memorandum p. 6 [emphasis added]. This statement, however, is not dispositive of where an appeal properly lies when the judgment has in fact been rendered by a three-judge court which has been properly convened. See, e.g., *Philbrook* v. *Glodgett,* 421 U.S. 707, 712 n. 8 (1975). The Solicitor General concedes (p. 6) that it is settled that here the three-judge Court was properly convened. 423 U.S. 963 (1975).

The question of where an appeal lies from a three-judge court properly convened in the first instance but arguably subject to dissolution thereafter may present

interesting academic and conceptual issues.[30] But it ought not deter this Court from summary affirmance of the court below for two reasons: (1) no useful purpose is served by referring insubstantial claims to another court and needlessly prolonging already protracted litigation and (2) with the repeal of 22 U.S.C. 1228 for future cases no undesirable policy would be established by a disposition on the merits.[31]

The Solicitor General also suggests (Memorandum, p. 10) that, should this Court grant certiorari to review *Indianapolis,* this case could be joined for full review under Supreme Court Rule 20. That would be appropriate only if the issues presented were both substantial and important. But the issues presented by this appeal do not become substantial by joining them with a case in a wholly different posture. Here, unlike *Indianapolis,* the issue of liability has already been decided by this Court; and on any view of the remedy issues, they are here wholly different and insubstantial compared to those posed by *Indianapolis* where the primary issue is whether any inter-district violation exists at all.

In short, neither Appellants nor the Solicitor General has presented any substantial argument for prolonging this litigation and there is every reason to bring it to a

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[30] An appropriate view of the interim remedy judgment here is that it remains within the original Congressional grant of direct apellate jurisdiction because it not only continues the injunction against the 1968 State-wide Statute but also necessarily provides further injunctive relief against its operation. See *Hicks* v. *Miranda,* 422 U.S. 332, 347 (1975).

[31] See P.L. 94-381. In the waning days of such three-judge courts, we do not think this Court need be detained by defining with technical precision at what point such a court *must* dissolve itself in injunctive proceedings flowing from an initial determination of the unconstitutionality of the state statute.

just and speedy conclusion by affirming without further argument.

CONCLUSION

WHEREFORE, Plaintiffs pray that their Motion to Affirm be granted and that the District Court's Interim Remedy Judgment be affirmed without further argument. The decision below is correct and presents no substantial issue requiring plenary review. The standards set for inter-district relief in *Milliken* v. *Bradley* were plainly met in the violation findings and have been scrupulously followed in the Interim Remedy Judgment.

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